

One Ringy-Dingy Too Many?

New Developments Designed to Reduce Unwanted Phone Calls and Faxes

By Mary Vandembosch, Research Analyst
Legislative Services Division
mvandembosch@mt.gov or (406) 444-5367
March 2004

Introduction

Technology has advanced significantly since the days when Lily Tomlin drawled "one ringy-dingy, two ringy-dingy" as she played Ernestine the telephone operator on Rowan and Martin's "Laugh-In." Those were the days when I could get in touch with my friends by spinning the dial on the rotary phone and leaving a message to call me at Lakeview x-xxxx or by heading out to the alley to see if anyone was around.

As a result of significant advances in technology, it has become much easier for "ET" to phone home, with or without wires. Furthermore, we can send images and messages virtually instantaneously. And whether or not the message is wanted, others can send information to us at what seems like supersonic speed.

This article addresses new developments regarding regulating *unwanted* commercial telemarketing calls and facsimile (fax) transmission, as well as certain prohibited telemarketing practices.

Keen interest in this topic was demonstrated during the 2003 legislative session. Six bills were introduced: three bills would have established a do-call or do-not-call list; one addressed unwanted faxes; and two were focused on telemarketing practices. Two bills were approved by the Legislature and signed by the Governor: House Bill No. 424, sponsored by Rep. Larry Jent, which established a state do-not-call list; and House Bill No. 637, sponsored by Rep. Holly Raser, which prohibited faxing of unsolicited advertisements.

Regulation of these activities involves, in simplistic terms, a determination of the appropriate balance between constitutional rights: the right to communicate and the right to be "let alone"^a -- the right to privacy. The appropriate location of the balance beam is a matter of dispute, and litigation abounds. Consequently, the regulatory mechanisms described in this article are subject to change. Resources for additional or updated information are included, and the reader is encouraged to consult these resources.

Federal Regulation of Telephone Solicitation

Since 1991, the U.S. Congress has approved at least four laws that address telemarketing. These

include the following:

- Telephone Consumer Protection Act of 1991;^b
- Telemarketing and Consumer Fraud and Abuse Prevention Act (1994);^c
- Do-Not-Call Implementation Act (2003);^d and
- National Do-Not-Call-Registry (2003).^e

Undoubtedly reflecting concerns raised by its constituents, when Congress enacted the Telephone Consumer Protection Act, it found, among other things, that "Many customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." In 1994, Congress found that it was necessary to enact legislation to offer consumers protection from telemarketing deception and abuse. Many states followed suit.

National Do-Not-Call Registry Established

Pursuant to these laws, the Federal Trade Commission and the Federal Communications Commission (FCC) have adopted rules and jointly established a national do-not-call list. Significantly, the FCC asserts that its telemarketing rules apply without exception to any entity engaged in any of the telemarketing activities targeted by the Telephone Consumer Protection Act and the FCC's related rules, including those that involve purely *intrastate* activities.

Under the federal rules, residential subscribers who do not want to be called by telemarketers have two options:

- Register a phone number on the national do-not-call list. Regulated telemarketers are prohibited from calling phone numbers on the list for a commercial purpose. (Exemptions are described below.) A consumer who wants to receive calls from certain businesses can authorize those calls in writing and still exclude other calls.¹
- Block calls from certain telemarketers by requesting that the telemarketer place the consumer on a company- or organization-specific do-not-call list. This option applies to some telemarketers that are exempt from compliance with the national do-not-call registry requirements.

Telemarketers are required to obtain the national list and updates at least quarterly. A fee is charged based on the number of area codes requested. To purchase the list for more than five area codes, the

¹For example, in "Mercedes Benz," Janis Joplin sang of her conviction that "Dialing for Dollars" was searching to find her. Assuming that "Dialing for Dollars" was subject to the law, Joplin could register for the do-not-call registry and provide written authorization for "Dialing for Dollars" to call her. Using this approach, her phone would be freed up so that Joplin could win the jackpot.

cost is \$25 a year for each area code, with a maximum annual fee of \$7,375 for the entire U.S. database. There is no charge to obtain the list for five or fewer area codes.

The following are exempt from the prohibition on telephone solicitation unless the resident has asked to be placed on the company-specific do-not-call list:

- calls to residential telephone subscribers with an established business relationship;
- calls to residential subscribers who have granted prior express permission to be contacted;
- tax-exempt nonprofit organizations and independent telemarketers calling on behalf of such organizations;² and
- calls to persons with whom the marketer has a personal relationship.

Response From Telemarketers

During the Federal Trade Commission's rulemaking proceeding, industry commenters raised the prospect of dire economic consequences. Individual sellers and telemarketing firms estimated that they might have to lay off up to 50 percent of their employees if the registry were to go into effect.^f Following an FCC vote to establish a do-not-call registry, the American Teleservices Association issued a news release entitled "FCC Votes to Eliminate Two Million Jobs."

Four lawsuits were filed against the federal government. Initially, two federal judges prohibited the federal government from enforcing the requirements. However, the U.S. Court of Appeals for the 10th circuit overturned these decisions, and the federal agencies were allowed to enforce the requirements pending appeal. The four cases were consolidated and heard by the 10th Circuit Court on November 10, 2003.^g On February 17, 2004, the court held that "the do-not-call registry is a valid commercial speech regulation because it directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech." Representatives of telemarketing associations remain concerned about the federal do-no-call regulations.

The primary issue in these lawsuits is whether or not the balancing of first amendment³ and privacy interests was appropriate. Furthermore, the October 31, 2003, brief for Mainstream Marketing Services, Inc., et al., and U.S. Security, et al., states that "the government assumed incorrectly that some speakers 'have rights that others don't.'"

²The Federal Trade Commission regulations require tax-exempt organizations to maintain a company-specific list; the FCC regulations do not. Some organizations will voluntarily honor a residential subscriber's request.

³Among others, the first amendment to the U.S. Constitution includes rights to freedom of speech and freedom of the press.

Montana's Do-Not-Call Program

Montana law requires the Department of Administration to adopt rules and have a do-not-call database in operation by January 1, 2004. The Department has adopted its rules and has elected to use the national do-not-call list for its database. The national list is available to states at no charge.

Federal law and rules establish the minimum do-not-call requirements. Montana law comes into play when it is more stringent and the call is an intrastate call. A significant difference between the two laws is the exemption for tax-exempt organizations. To qualify for the exemption in Montana, a bona fide member of the exempt organization must make the communication.

Prohibited Telemarketing Practices

Selected telemarketing practices that are prohibited by federal or state law, or both, include the following:

- Calling before 8 a.m. or after 9 p.m.
- Automated telephone solicitation using various devices to play recorded messages. Montana law^h is broad with narrow exemptions. For example, it is illegal to gather data or promote a political campaign using a recorded message.
- Failing to identify the telemarketing firm making the call.
- Interfering with caller identification. The telemarketer must provide a telephone number that can be used to make a do-not-call request during regular business hours.

Unwanted Faxes

The 2003 Montana Legislature approved a law that prohibited transmission of unsolicited advertisements to a fax machine and provided an exemption for public safety. The FCC also strengthened its rules governing unwanted faxes. Specifically, the rules prohibit sending an unsolicited advertisement to a fax machine without the prior written permission of the recipient of the advertisement. The FCC rules now specifically address "fax broadcasters" -- entities that transmit advertisements for others to a large number of fax machines for a fee.

Resources

To register or remove your phone number from the National Do-Not-Call list, call 1-888-382-1222 or 1-866-290-4236 for TTY.⁴ You can also register via the Internet at www.donotcall.gov.

⁴Teletypewriter for communicating with deaf persons using telecommunications systems.

More information about the National Do-Not-Call program can be viewed at <http://www.fcc.gov/cgb/donotcall>.

Information about Montana's Do-Not-Call Program, unwanted faxes, and other telecommunications practices is available from the Montana Consumer Protection Office at (406) 444-4500.

Information about unwanted faxes and other issues related to telecommunications practices is available at http://www.fcc.gov/cgb/information_directory.html or 1-888-225-5322 (1-888-835-5322 for TTY).

Endnotes

- a. Rowan v. United States Post Office Department, 397 U.S. 728 (1970)
- b. P.L. 102-243, codified at 47 U.S.C. § 227
- c. 15 U.S.C. §§ 6101-6108
- d. P.L. 108-10
- e. P.L. 108-82
- f. Federal Trade Commission Telemarketing Sales Rule; Final Amended Rule (Federal Register Vol. 68, No. 19, Wednesday, January 29, 2003) at 4631
- g. Docket Nos. 03-1429, 03-6258, 03-9571, and 03-9594
- h. 45-8-216, MCA